No. 86-1508

# In the Supreme Court of the United States

**October Term, 1986**

DAVID HANKINS,

*Petitioner,*

*v.*

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a federal law enforcement officer, such as petitioner, is entitled to immunity from state prosecution for a crime committed while acting in his official capacity, if his conduct was not objectively reasonable.

2. Whether petitioner's trial counsel rendered effective assistance of counsel in his presentation of a modified form of the "federal immunity" defense.

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### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A19-A39 and A56-A57) and of the district court (A1-A18 and A40-A55) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 13, 1987. The petition for writ of certiorari was filed on March 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of brandishing a firearm, a misdemeanor, in violation of Section 417(a) of the California Penal Code. His case had been removed from state court to federal court pursuant to his motion under 28 U.S.C. § 1441(a)(1), which authorizes such a removal if a defendant may raise a defense based on his official duties as a federal officer. Petitioner was sentenced to serve six months in the county jail, with the execution of all but thirty days suspended, and was placed on probation for one year.

Petitioner appealed his conviction and, at the same time, he filed in the district court a motion to vacate his conviction pursuant to 28 U.S.C. § 2255. That motion was denied without a hearing, and petitioner appealed. The court of appeals affirmed the conviction, but vacated the denial of the § 2255 motion and ordered a hearing on: the competency of petitioner's trial counsel; and the prejudice, if any, of petitioner's trial counsel's failure to present a defense based on "federal immunity." The hearing was held and the district court concluded that petitioner's trial counsel had presented, in effect, a federal immunity defense and that, assuming for the sake of argument, that the federal immunity defense was not presented, there was no prejudice. The court of appeals affirmed.

The evidence showed that on June 8, 1982, petitioner, while acting as a United States Border Patrol Agent, was a passenger in a Border Patrol vehicle in pursuit of a Ford automobile containing individuals suspected of being aliens unlawfully in the United States. (R.T.

103).[1] The pursuit occurred on a major freeway in morning rush-hour traffic. (R.T. 103-04, 125, 138). As the Border Patrol vehicle approached the left side of the Ford, petitioner pulled out his revolver, cocked it, pointed at the Ford and fired one round which shattered the driver's window. (R.T. 107-08, 139, 207). The driver of the Ford was struck by the shattered glass, but was not injured otherwise. (R.T. 126, 141). The driver then stopped the Ford on the side of the freeway. (R.T. 140-41).

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[1] "R.T." refers to the Reporter's Transcript of petitioner's trial.

## ARGUMENT

1. Petitioner, who asserts that his trial counsel did not rely on the so-called "federal immunity" defense (Pet. 15-16), nevertheless contends that the Court of Appeals for the Ninth Circuit in *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977), has unduly restricted that defense by requiring that the federal officer's conduct be "objectively reasonable." Petitioner is foreclosed from raising this contention since he failed to present it to the court of appeals or the district court. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955). In any event, the Ninth Circuit, along with the other courts which have ruled on the issue, properly have limited federal immunity to those officers whose conduct was objectively reasonable.

It is well settled that, under the Supremacy Clause (Article VI) of the U.S. Constitution, a federal officer is not subject to state prosecution for acts which are committed in the performance of his duties and which are necessary and proper to the performance of those duties. *In re Neagle*, 135 U.S. 1, 75-76 (1890). In *Clifton v. Cox*, 549 F.2d at 728, the Ninth Circuit held that the determination of whether an officer's actions were necessary and proper "must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may be said to be reasonable under the existing circumstances." Other courts previously had held that, to be immune from prosecution, the officer must honestly and reasonably believe that his actions were necessary and proper. *Castle v. Lewis*, 254 F. 917, 921 (8th Cir. 1918); *In re McShane*, 235 F. Supp. 262, 274 (N.D. Miss. 1964); *Brown v. Cain*, 56 F. Supp. 56, 58 (E.D. Pa. 1944). Subsequent to the Ninth Circuit's decision in *Clifton v. Cox*, courts have continued to hold that the federal immunity defense

requires that the officer honestly and reasonably believe his actions were necessary and proper. *Commonwealth v. Long*, 637 F. Supp. 1150, 1152 (W.D. Ky. 1986); *State v. Marra*, 528 F. Supp. 381, 387 (D. Conn. 1981). Therefore, the lower courts unanimously have applied an "objective reasonableness" standard to the federal immunity defense, by requiring that the officer reasonably believe his actions were necessary and proper.

Petitioner speciously argues that the "objective reasonableness" test departs from "the traditional criminal intent/wantonless standard and establishe[s] a rule that imposes criminal liability based upon an ordinary negligence standard." (Pet. 12). However, the "objective reasonableness" test is not such a departure. Indeed, it has long been a material element of the principle of self-defense. That is, to establish self-defense, a defendant must have had reasonable grounds to believe that he was in imminent danger. *See Brown v. United States*, 256 U.S. 335, 343 (1921); 2 Devitt & Blackmar, *Federal Jury Practice and Instructions*, §§ 41.19 and 41.20 (3d ed. 1977).

Moreover, the "objective reasonableness" test does not create criminal liability for federal officers based on negligent conduct. If a federal officer acts "negligently" by using bad judgment, he nevertheless will be immune from state prosecution so long as he reasonably believed his actions were necessary and proper. See *In re McShane*, 235 F. Supp. at 274.

For example, in *Commonwealth v. Long*, 637 F. Supp. at 1152, the defendant, a Special Agent with the Federal Bureau of Investigation (FBI), failed to obtain the necessary approval of a superior to authorize an informant to participate in a burglary as part of an undercover investigation. Although the defendant was

reprimanded and given administrative punishment by the FBI for his failure to follow FBI guidelines, the defendant was immune from state prosecution for his participation in the "burglary" because he reasonably believed his actions were necessary and proper. *Id.* "[I]f the conduct is necessary and proper and part of the agent's authorized duties, even when he uses poor judgment, he is protected by the Supremacy Clause of the Constitution." *Id.*

2. Petitioner, as stated above, also contends that his trial counsel was ineffective in not raising the federal immunity defense. (Pet. 15-16). This claim is insubstantial.

As found by the district court below at the § 2255 hearing, petitioner's trial counsel presented the essence of the federal immunity defense:

> Had the lawyer brought it up as a trial defense, I certainly — well, my first feeling that in fact it was done. All of the matters that you call to my attention having to do with reasonableness of behavior, reasonableness of conduct, good faith belief in what he had a right to do — all of those things were actually tried before this jury and decided against this defendant.

(Hg T. 42-43).[2] Under the federal immunity defense, petitioner would not be subject to prosecution if he used reasonable force in stopping the Ford. (R.T. 239). The testimony elicited by petitioner's trial counsel, together with the district court's instructions and trial counsel's argument, focused on whether petitioner's use of the

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[2]"Hg T." refers to the transcript of petitioner's § 2255 hearing.

revolver was reasonable. (R.T. 240, 264, 266-67, 269-71, 286-87). Under the federal immunity defense, petitioner could not be prosecuted for conduct which was authorized by the U.S. Border Patrol. Petitioner testified and trial counsel argued that his conduct was authorized, and the jury was instructed that they had to determine whether petitioner's conduct was proper, that is, authorized. (R.T. 239, 264, 266-67, 287). Lastly, under the federal immunity defense, petitioner could not be convicted if he was acting in self-defense or in defense of others. (T. Ex. 1, p. 17-11).[3] Petitioner's testimony, trial counsel's argument and the court's instructions all addressed that issue. (R.T. 215, 238, 240, 287-89).

Even assuming, for the sake of argument, that petitioner's trial counsel did not present the essence of the federal immunity defense and therefore was ineffective, nevertheless petitioner was not prejudiced by that omission and is not entitled to any relief. If a defense counsel is ineffective, a defendant, to obtain relief, "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). There is no reasonable proability that the result of the proceeding below would have been different if trial counsel had presented petitioner's defense explicitly as a federal immunity defense. As noted by the district court below:

> This lawyer, in my opinion and in his own opinion, made a tactical choice in how he was going to defend this defendant, and he brought out all of his guns, and in my opinion did everything that a competent lawyer ought to

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[3]"T. Ex." refers to the indicated trial exhibit.

> do under the facts of this case in order to try to convince a jury that this man did not wantonly brandish a gun to the danger of other persons, and I remember the facts of this case, and I came away from it feeling that this man had no business in law enforcement if his conduct was going to be such as it was in this case, and I cannot say to you that in my opinion the giving of a label by [petitioner's trial counsel] to this federal immunity defense and calling it such and bringing it up in any more vivid manner than it was resorted to would have brought about any greater likelihood of another result in this case.

(Hg T. 43-44).

The record shows, as found by the district court, that petitioner was not entitled to federal immunity. (Hg T. 42). In particular, the record shows that petitioner did not honestly or reasonably believe that his use of a firearm to stop the fleeing Ford automobile was necessary and proper. The only offense which the Ford's passengers were suspected of was the misdemeanor offense of being aliens unlawfully within the United States.[4] (R.T. 224). The driver of the Ford was suspected only of the felony offense of transporting undocumented aliens[5] and the misdemeanor offense of being an undocumented alien in the United States. (R.T. 224-25). Yet, petitioner, by cocking his pistol and pointing in the direction of the Ford, endangered its occupants. (R.T. 223). Petitioner's use of deadly force to apprehend the occupants of the Ford was patently excessive and

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[4] In violation of 8 U.S.C. § 1325.

[5] In violation of 8 U.S.C. § 1324(a)(2).

unreasonable. *See Garner v. Memphis*, 105 S. Ct. 1694 (1985) (deadly force unreasonable in apprehending burglary suspect).

Petitioner's use of a gun to stop the Ford was against proper police procedure (R.T. 149-51) and violated Border Patrol policy. (T. Ex. 1, pp. 17-11, 24-3, 24-22, R.T. 100-02). Moreover, petitioner knew that such use of a gun was not authorized, in that he had been warned approximately eight months before in a similar incident that he could not use his gun to stop a fleeing vehicle. (R.T. 100-01). Under these circumstances, petitioner was not prejudiced by any failure of his trial counsel explicitly to raise the federal immunity defense.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 1, 1987, I served the within *Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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*(Original and forty copies)*

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
*(Original signed)*